



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :
- against - : FINAL
Police Officer Joseph Martins : ORDER
Tax Registry No. 932972 : OF
Military & Extended Leave Desk : DISMISSAL
-----X

Police Officer Joseph Martins, Tax Registry No. 932972, Shield No. 1839, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 2013-9677, as set forth on form P.D. 468-121, dated May 28, 2013 , and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Joseph Martins from the Police Service of the City of New York.


WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE: ON MAY 23, 2014 @0001hrs



POLICE DEPARTMENT

May 6, 2014

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In the Matter of the Charges and Specifications : Case No.
- against - : 2013-9677
Police Officer Joseph Martins :
Tax Registry No. 932972 :
Military and Extended Leave Desk :
-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: Daniel Maurer, Esq. & Jennifer Kim, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street - Suite 640
New York, New York 10038

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on February 3 and February 4, 2014, charged with the following:

1. Said Police Officer Joseph Martins, assigned to the 102nd Precinct, on or about and between October 1, 2012 and May 1, 2013, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer, without authority or police necessity, did possess a controlled substance, to wit, amphetamines. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT GENERAL REGULATIONS

2. Said Police Officer Joseph Martins, assigned to the 102nd Precinct, on or about and between October 1, 2012 and May 1, 2013, did engage in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer, without authority or police necessity, did ingest a controlled substance, to wit, amphetamines. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT GENERAL REGULATIONS

The Department was represented by Daniel Maurer and Jennifer Kim, Esqs., Department Advocate's Office and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Dr. Thomas Cairns, Police Surgeon Joseph Ciuffo, and Case Management Nurse Oscar Bellesia as witnesses.

Thomas Cairns

Cairns has been employed at Psychomedics Corporation (Psychomedics) since 1988 and currently serves in the positions of senior scientific advisor and deputy lab director. He holds a bachelor's degree in chemistry, a doctorate degree in biochemistry, and a post doctorate degree in toxicology. He has over a hundred peer-reviewed publications to his credit. Both he and Psychomedics hold licenses from the New York State Department of Health to practice forensic toxicology, in particular hair analysis for drugs of abuse. Psychomedics has been licensed and certified by several states and associations. Department's Exhibit (DX) 1 contains copies of these licenses and certifications, and DX 2 is Cairns' curriculum vitae. Cairns has previously testified in court as an expert witness, and he was deemed an expert witness in forensic toxicology with a specialty in hair analysis at this proceeding.

Cairns explained that an ingested drug enters the bloodstream and circulates past the base of the hair follicles. The drug and its metabolites thereby get trapped inside the hair as it grows. Since hair grows at a predictable rate, it acts as a timeline as to when the drug was ingested. While hair on the head grows at a rate of approximately half an inch per month, body hair grows at different rates. A sample of leg hair represents a look-back period of six to seven months.

3, 4-Methylenedioxy-N-methylamphetamine (MDMA or Ecstasy) is a designer amphetamine. When ingested and passed through the liver, it becomes the metabolite 3, 4-Methylenedioxyamphetamine (MDA). It is sold as a tablet. It is not the type of drug that is commonly smoked or snorted. When asked if there is any possibility of passive or unintentional ingestion, Cairns testified, "It would be difficult . . . to come up with a scenario that would explain accidental [ingestion], but it's possible that the tablet could be dropped in someone's drink. But that one tablet... is insufficient to get anywhere near the cutoff [level]." When

testing Department samples for amphetamine, Psychomedics deems a test positive only when the administrative cutoff level of five nanograms of amphetamine per 10 milligrams of hair (5ng/10mg) is met or surpassed.

Once leg hair is taken by Department collectors, the hair is divided into three samples. Two of the samples are sent to Psychomedics under chain of custody in tamper-evident sealed envelopes. The third sample is maintained by the Department. At Psychomedics, five or six milligrams of hair from one of the samples are dissolved by enzymatic digestion and then analyzed by enzyme immunoassay (EIA). If the EIA reveals the probability of the presence of an illegal drug at or above the cutoff level, the sample is deemed presumptive positive and testers return to the original sample envelope to retrieve 12 more milligrams of hair. This hair undergoes an aggressive washing process to eliminate any possible external contamination before being dissolved and analyzed via mass spectrometry (MS). Cairns described MS as "the structural identification of the drugs under investigation, and an unambiguous identification because each molecule has a unique fingerprint." If the MS analysis has positive results, the test is reviewed by a certifying scientist for quality assurance. The second sample that was received by the lab is then opened and sent for the same washing process and MS analysis. Only if this confirmatory test also comes back with positive results does Psychomedics notify the Department.

DX 3 is a Laboratory Data Package that Cairns prepared and signed on May 20, 2013. It details the chain of custody with respect to Respondent's hair samples. Respondent was identified in the package as number 20-1662-13-XH. The package shows that Respondent initialed the seals of the sample collection envelopes near a declaration that read, "I certify the sample contained in the envelope is my sample. It was cut close to the skin and I witnessed the sample collector seal the sample in the envelope." DX 4 is a sample collection envelope

containing this declaration. The package indicates that Respondent's first hair sample tested positive for Ecstasy at a level of 8.4ng/10mg and the metabolite MDA at .3ng/10mg. The second sample tested positive for Ecstasy at a level of 10.8ng/10mg and MDA at .6ng/10mg. Cairns explained that the administrative cutoff level was established to differentiate a drug user from someone who was environmentally contaminated or exposed to the drug within a margin of conservatism. The fact that the levels of Ecstasy found in Respondent's hair were approximately double the cutoff level indicated multiple ingestions of the drug during the look-back period.

Cairns testified that Ecstasy is a unique compound, and OxyELITE Pro [hereinafter, OxyElite Pro] does not contain Ecstasy. It contains instead a stimulant called dimethylamylamine (DMAA), which is an entirely different molecule with an entirely different molecular weight from Ecstasy, and it is in no way recognizable by MS as Ecstasy. Ingesting DMAA cannot result in a positive test result for Ecstasy. Respondent taking an antibiotic and hydrocodone would not have affected his test results.

DX 5 is a Laboratory Report from Quest Diagnostics (Quest). Cairns was able to determine by reviewing the report that the third hair sample that the Department collected from Respondent was sent to Quest for testing. The Quest test came back with a positive result for Ecstasy at a level of 11.6ng/10mg.

On cross-examination, Cairns confirmed that Psychemedics is a private company that is traded on the stock exchange. One of its focuses is to stay profitable for its stockholders. Psychemedics processes 3,000 tests a day. While Cairns oversees the testing, it has been a number of years since he has actually conducted a test himself. He did not personally have anything to do with the testing of Respondent's samples. Approximately 50 technicians are involved in the processing of each test. During the course of his 25 years with Psychemedics, Cairns has never found any employee to have mishandled samples. He further added the New

York State Department of Health conducted a site visit to Psychemedics on an annual basis, to examine the credentials of each and every analyst and make sure they are in compliance with State of New York Department of Health rules and regulations. He recalled there being just one testing error during that period. He explained this error: "Samples got transposed at some point with another sample, ... but it was caught because the screen [immunoassay screening test] said positive and the mass spec said negative. . . . That's how we catch the errors. I'm not saying we don't make mistakes. We could, we're not infallible. But we catch them because of the duality of the system." Because of the two-test system, it is virtually impossible for there to be a false positive test result.

Cairns agreed that Ecstasy tablets come in different potencies. A person who takes Ecstasy has lots of energy and feels euphoric, but the drug can affect different people in different ways. Cairns reiterated that the concentration of Ecstasy found in Respondent's samples indicated multiple ingestions of the drug during the look-back period, perhaps recreational use consisting of one tablet a week. DMAA would not be detected in a Psychemedics test.

Upon questioning by the Court, Cairns explained that the Food and Drug Administration (FDA) has required OxyElite Pro to stop using DMAA as an ingredient, but even before that occurred the ingestion of OxyElite Pro would not have triggered positive test results for amphetamine. Amphetamine is a controlled substance, and the FDA does not permit products containing controlled substances to be sold over the counter.

On recross-examination, Cairns confirmed that products can be sold without getting pre-approval from the FDA. The FDA will, however, investigate claims of an over-the-counter product containing a controlled substance. Any over-the-counter product found to contain a controlled substance will be taken off the shelves. He gave an example of products containing hemp oil that were on the market for four to six months before being removed by the FDA.

On redirect examination, Cairns confirmed that incorporating Ecstasy into a dietary supplement would expose a company to criminal prosecution and civil liability. A person who takes an over-the-counter supplement containing a legal stimulant would not test positive for Ecstasy. The FDA ruled that DMAA should be removed from OxyElite Pro because the compound was causing adverse effects, including death in a few people. According to the FDA investigation, however, OxyElite Pro never contained Ecstasy.

Police Surgeon Joseph Ciuffo

Ciuffo, a ten-year member of the Department assigned to the Medical Division, currently serves as a medical review officer. He explained his position: "A medical review officer is a licensed physician with familiarity with drug testing and drug testing procedure policy. The medical review officer reviews drug test results and looks for alternative explanations for a positive result, for example, prescription medications, alternatives for making samples positive."

In a May 15, 2013 interview, Respondent told Ciuffo that he took hydrocodone, antibiotics, and pre-workout supplements, such as Cellucor C4 and Bomax. When Ciuffo researched these substances, he saw that none of them contained Ecstasy or would have caused a positive test for amphetamine. According to Ciuffo, Respondent did not offer any plausible explanation for why he tested positive for Ecstasy. Respondent never specifically mentioned to Ciuffo anything about taking OxyElite Pro. DX 6 is a worksheet prepared by Ciuffo for Respondent's case.

On cross-examination, Ciuffo testified that he could not think of any supplement that would cause a false positive test result for Ecstasy. On the day that Respondent's hair samples were collected, Respondent filled out a form on which he was asked to list any prescription

medications he had taken in the last three months. Respondent listed hydrocodone and an antibiotic. The form did not ask anything about over-the-counter substances.

Ciuffo took notes during his interview with Respondent. He conceded that he was basing his testimony off of those notes, as he did not have an independent recollection of Respondent's case. Ciuffo completed his research on Respondent's case on the same day that he met with Respondent.

When asked about the connection between over-the-counter products offered at stores like GNC and positive drug test results, Ciuffo replied that in his experience there was "very little connection, although, from time to time depending on the situation, it might be pertinent." While he has knowledge of over-the-counter supplements affecting results in steroid testing, he has not seen this occur for amphetamine. Ciuffo testified that DMAA would not cause a false positive result for amphetamine, though he did not know about research of DMAA with regard to supplements.

On redirect examination, Ciuffo confirmed that it is the responsibility of those members of the service who take supplements and prescription drugs to make sure that they are not taking illegal substances outside the prescription of a physician. While there are medical reasons for physicians to prescribe amphetamines, there is no medical reason to prescribe Ecstasy.

Upon examination by the Court, Ciuffo testified that although he was not familiar with OxyElite Pro, nobody in the United States should be able to purchase an over-the-counter product that would cause a positive test for amphetamine. He explained that because amphetamine is a controlled substance, any product containing amphetamine is available only through a prescription by a licensed physician.

On recross-examination, Ciuffo testified that he did not save any of the research that he conducted on Respondent's case.

Case Management Nurse Oscar Bellesia

Bellesia, a 20-year member of the Department, has been assigned to the Medical Division's Drug Screening Unit for about a year and a half. On May 1, 2013, he collected hair samples from Respondent's leg for a random drug test, though he did not have a specific recollection of that day.

Bellesia explained that an officer who reports to the Medical Division for drug testing must fill out a Drug Screening Questionnaire, which asks about medications the officer has taken in the past three months. The officer's fingerprint also goes on the document. Respondent noted on his questionnaire [DX 7] that he had taken hydrocodone and an antibiotic.

After an officer prepares the questionnaire, Medical Division personnel confirm the officer's identity against his identification card, and a drug screening number is generated from the computer. This screening number is placed on the custody and control forms. After the paperwork is prepared, the officer is brought into the cutting room, where Bellesia would wipe down the table with alcohol and cover it with paper. The officer would put his leg on the table, and Bellesia, while wearing gloves, would use a never-before-used disposable razor to shave approximately 150 milligrams of hair onto the table. Bellesia would divide the hair into three separate samples, fold each of the samples in tin foil, and place each sample into its own collection envelope. Bellesia would then seal the envelopes, and the officer would initial them to certify that it was in fact his hair inside. Bellesia would place the envelopes in plastic pouches, and the officer would initial these also. DX 8 is a custody and control form, signed by both Respondent and Bellesia on the day of hair collection.

Bellesia learned at a later date that Respondent had been drug tested in error. It was actually another officer at Respondent's command with the same surname who was supposed to be tested.

On cross-examination, Bellesia conceded that he should have more closely verified Respondent's identification. He was not disciplined for testing the wrong officer.

Bellesia conducts between four and eight sample collections a day. He did not recall if Respondent was the first person he collected from on May 1, 2013. The cutting room has three desks, so as many as three members of the service can be prepped at one time. At the time of Respondent's sample collection, however, nobody else was being screened.

Bellesia testified that it is his normal procedure to open the collection envelopes before entering the cutting room. After the hair samples are sealed in the envelopes, they are temporarily locked in storage.

Respondent's Case

Respondent called Deputy Inspector Sylvester Ge as a witness and testified in his own behalf.

Deputy Inspector Sylvester Ge

Ge, who has been assigned to the Internal Affairs Bureau (IAB) on and off for ten years, received the notification of Respondent's positive random drug test results. Respondent was summoned to the Medical Division and given an opportunity to provide a possible explanation for the results. Ge explained that when tests come back positive for certain drugs, officers are given this opportunity because there are legal substances that can cause false positives.

In a July 2013 official Department interview, Respondent denied ever using Ecstasy and stated that he researched possible explanations for the positive test results. Respondent believed that supplements he had bought at GNC might have caused his hair samples to falsely test positive. Respondent showed Ge Chase Bank account records, and investigators were able to verify that Respondent did in fact purchase OxyElite Pro on January 4, 2012. Respondent stated that he started to use the pills, stopped for a while because it was affecting his [REDACTED] [REDACTED] and restarted taking the pills approximately a year later. [Respondent's Exhibit (RX) A is an IAB case worksheet and RX B is a worksheet containing Respondent's GNC purchases, both of which confirm Respondent's purchase of the OxyElite Pro.] Internet research conducted by both Respondent and investigators led to some articles about OxyElite Pro causing false positive test results for amphetamine. Ge did not find any corroboration to Respondent using Ecstasy other than the test results.

On cross-examination, Ge testified that the information he found about OxyElite Pro causing false positive results came from internet forums, not from websites that specifically spoke to the medical properties of the supplement. He confirmed that none of his research showed OxyElite Pro to contain amphetamine.

Respondent

Respondent, a ten-year member of the Department currently assigned to the Military and Extended Leave Desk, spent eight years working in the 102 Precinct. For his last two years in the precinct he served as community affairs officer. He has never before been the subject of Department charges. Respondent testified that he has never done Ecstasy or any other illegal drug. He has never willingly ingested amphetamine.

When Respondent received notice to report to the Medical Division for random drug testing on May 1, 2013, he did not resist in any way. On May 14, he was notified to return to the Medical Division the following morning. At the Medical Division on May 15, Ciuffo informed him of the positive test results for Ecstasy and asked him for any possible explanation. Respondent told Ciuffo about the "pre-workout powder" and "protein post-workout stuff" that he was taking. Ciuffo sent Respondent to the waiting room. After ten or 15 minutes, Ciuffo called Respondent back into the office and asked if there was anything else Respondent might have taken to cause a positive test result. Respondent explained his reaction, "I didn't know what was going on. I was just flabbergasted that I tested positive for something. So I couldn't think of anything else at the time; so that was it, and then they had suspended me." He has been suspended from duty since that day.

Respondent did not think about OxyElite Pro at the time of his interview with Ciuffo. Respondent had purchased a 90-pill bottle of the product at GNC in January 2012. He started to use it at that time but stopped because it was [REDACTED]. In February 2013, after breaking up with his girlfriend, he started to use the product again to get back in shape. He took a pill before working out, which amounted to one or sometimes two pills a day. Internet research that Respondent conducted after being suspended from duty revealed countless articles about the product causing false positive results for amphetamine. The internet research also revealed that in February 2013 the FDA ordered the company that produced OxyElite Pro to remove DMAA as an ingredient. Respondent, however, was still using the bottle that he had purchased the previous year, which he said did have DMAA.

When asked if, while serving as community affairs officer at the precinct, a supervisor ever approached him about not looking right, Respondent testified, "In my career with the NYPD, I've always had great write-ups from my supervisors.... I've had multiple letters in my

file from everybody you could think of in the community,... stating that... they loved Officer Martins.” Respondent’s commanding officer picked Respondent to become the community affairs officer without Respondent even asking for the position.

On cross-examination, Respondent testified that prior to May 1 2013, he engaged in off-duty employment at an entertainment company. His job involved playing music or dancing at private events, such as bar mitzvahs and sweet-sixteen birthday parties. Some of the events were held at clubs.

During his time with the Department, Respondent has never responded to a call where the victim or perpetrator was on Ecstasy. He remembered people talking about Ecstasy when he was a teenager, but he has never actually seen it. He did not do any research into the side effects of OxyElite Pro prior to taking it. He did not recall there being any warnings on the label. He is familiar with the Department’s policy regarding supplements and members of the service being responsible for anything and everything that they put in their bodies.

FINDINGS AND ANALYSIS

Specification Nos. 1 and 2

Random drug screening selection and hair sample collection and testing procedures

Respondent does not challenge the computer software program that generated names on a list of members who were to be ordered to report to the Medical Division for random drug screening. This computer program has been found to satisfy the requirements of randomness sufficient to justify a drug testing order.¹

Affirmative defense to hair sample collection

¹ Worrel v. Brown, 177 A.D.2d 446 (1st Dept 1991), leave to appeal denied, 79 N.Y.2d 755 (1992).

Respondent testified that a mistake was made in his selection as a person to be tested. A member of the service with the same surname was actually the person to be tested. However, Respondent was notified to report to the Medical Division by someone in his command. Respondent was called, assuming by surname at the Medical Division and the hair collector, Bellesia, acknowledged that he should have more closely verified Respondent's identification. It was later learned that Respondent was not the person who should have been tested. This ministerial error does not obviate the randomness of the test, as well as the fact that the proper procedures for collecting the hair-- packaging, sealing and transporting the sample to Psychomedics for testing was followed in this case. Thus I credit the collecting procedures utilized by Bellesia.

Respondent did not successfully challenge the EIA test that was utilized by Psychomedics to initially analyze one of Respondent's two hair samples for the presence of amphetamines, or the MS instrumentation that was utilized by Psychomedics to analyze both of Respondent's hair samples to quantify the concentration levels of amphetamines and methylenedioxyamphetamine (MDA), the principal amphetamine metabolite that is produced in the body when methylenedioxy methylamphetamine (MDMA or Ecstasy), the designer amphetamine is ingested in the body, passed through the liver and metabolized.

Cairns, the deputy lab director and senior scientific advisor at Psychomedics was deemed to be an expert in the field of forensic toxicology with a specialty in hair analysis based on the fact that he and Psychomedics hold licenses from the New York State Department of Health to practice forensic toxicology in particular hair analysis for drugs of abuse and has over a hundred peer-reviewed publications, as well as a review of his curriculum vitae (DX 1 and DX 2). Cairns explained and interpreted the data contained in the laboratory data package produced by Psychomedics which details the analytical results of the testing of Respondent's hair samples

(DX 3). Although Cairns did not personally conduct any of these tests, due process does not require that the technicians who performed these tests testify at the disciplinary hearing because testing results may be admitted and credited based on the testimony of the laboratory director or deputy director where, as here, the reliability of the testing procedure used has been established, the deputy director is familiar with all the steps taken, the deputy director is subjected to cross-examination and no claim is raised that there was a specific defect in the testing procedures.² Although Respondent raised questions as to whether the accessioners who test the samples can make mistakes, [Cairns answered by testifying that Psychemedics' dual methodology of testing catches any errors and the New York State Department of Health conducts a site visit of Psychemedics annually to examine the credentials of each and every analyst and to make sure they are in compliance with State of New York Department of Health rules and regulations], Respondent did not allege any specific defect in the chain of custody or testing procedures utilized by Psychemedics.

Cairns testified that the testing data shows that after five or six milligrams of hair from one of Respondent's hair samples tested positive for the illegal drug, via the process of dissolving the hair by enzymatic digestion and then analyzed scientifically via the enzyme immunoassay (EIA) recognized screening method, the testers go back to his original sample envelope, retrieve 12 more milligrams of hair and undergo an aggressive washing process to eliminate any possible external contamination before being dissolved and analyzed via mass spectrometry (MS). If that sample tests positive following the MS analysis, a certifying scientist reviews the test for quality assurance. The second sample is then sent for the same washing process and MS analysis. If the confirmatory test comes back positive also, Psychemedics will notify the Department.

² Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994).

Cairns testified that Respondent's first sample tested positive for Ecstasy at a level of 8.4ng/10mg of hair and the metabolite MDA at .3ng/10mg. The second sample by mass spectrometry tested positive for Ecstasy at a level of 10.8ng/10mg and MDA at .6ng/10mg. Cairns explained that the Department-established administrative reporting cutoff level for amphetamines is five nanograms per ten milligrams of hair. Cairns opined that Respondent's hair samples and their positive tests represented "multiple ingestions of the drug over the time line," of six to seven months. He said that MDMA or Ecstasy was declared a controlled substance by the United States government and that it is a unique compound not found in any other substance. He also said that Ecstasy is ingested in a tablet form and is not something one could breathe in, in the atmosphere, such as at a night club.

Cairns was also asked to review the results of a Quest laboratory report (DX 5). Cairns testified that the laboratory report test noted that the test was for "leg hair" and that the identification given was "20—1662-13-XH." He explained that the identification number was the same as the number on the subject identification number for the two samples sent to Psychemedics for testing. He concluded that the Quest sample was the third hair sample collected from Respondent that was sent for independent testing. Cairns testified that Respondent's third hair sample tested positive for Ecstasy, MDMA, at a concentration level of 1,168 picograms per milligram of hair. Cairns said if he translated those numbers into comparable Psychemedics terms, 1000 picograms equal one nanogram. Therefore, the sample tested positive at a rate of 11.6 nanograms per 10 milligrams of hair, well above the cutoff level of five nanograms.

Where as here, a recognized screening test positive result is confirmed when the same sample is subjected to MS analysis, such testing results have been found to constitute substantial

scientific evidence of the presence of a controlled substance.³ Based on all of the above, the test results obtained by Psychemedics regarding both of Respondent's hair samples, coupled with the third sample tested by Quest, constitute substantial evidence that Respondent possessed and ingested a controlled substance between October 1, 2012 and May 1, 2013.⁴

Affirmative defense of ingestion of OxyElite Pro, hydrocodone and antibiotics.

Respondent raised an affirmative defense the fact that he used OxyElite Pro, an over the counter supplement he purchased at GNC stores. He testified that his online research indicated that the chemicals in that substance could result in a false positive for amphetamines. Cairns explained that he scientifically researched OxyElite Pro and that it contained a stimulant, called dimethylamylamine (DMAA), which is an entirely different molecule from Ecstasy. He explained that mass spectrometry would not recognize DMAA as Ecstasy and that ingestion of DMAA could not result in a false positive for MDMA. Cairns further stated that neither antibiotics nor hydrocodone would affect the test results in this case.

Additionally, Police Surgeon Joseph Ciuffo testified. He said that he serves as the medical review officer for the Department and that his function is to review drug test results and look for alternative explanations for a positive result. Ciuffo testified that Respondent offered no plausible explanation as to why he tested positive for Ecstasy. He further testified that amphetamines are controlled substances only available through a prescription by a licensed physician. He noted that there was no medical reason to prescribe a controlled substance such as Ecstasy.

Conclusion

³ McBride v. Kelly, 215 A.D.2d 161 (1st Dept 1995).

⁴ McGovern v. Safir, 266 A.D.2d 107 (1st Dept 1999).

Based on this record, the only conclusion that can be reached is that Respondent possessed a controlled substance, amphetamines and he ingested amphetamines.

Respondent is found Guilty as charged of Specification Nos. 1 & 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

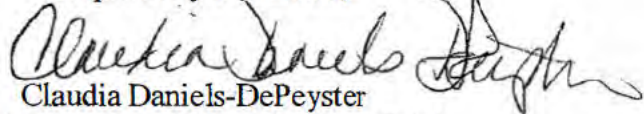
Respondent has been found Guilty of possessing and ingesting a controlled substance, namely amphetamines or Ecstasy. Although Respondent has served ten years as a uniformed member of the service with no prior, formal disciplinary record, Respondent has violated the Department's rule against using illegal drugs. This tribunal has had numerous instances where termination was recommended as a penalty for possession and ingestion of a controlled substance. See for example, Disciplinary Case No. 82184/06, signed July 16, 2008; Disciplinary Case No. 83905/08, signed February 4, 2009; and Disciplinary Case No. 86122/10, signed July 19, 2010. In addition, this tribunal has had several cases where these recommendations were upheld on appeal. See for example, Disciplinary Case No. 78362/02, signed June 22, 2003, affirmed sub nom, 802 N.Y.S.2d 683 (1st Dept 2006); Disciplinary Case No. 82337/06, signed April 7, 2008, affirmed App. Div. 1st Dept (NY Slip Op 07262 2010); Disciplinary Case No. 81455/05, signed August 3, 2007, affirmed 893 N.Y.S.2d 552 (2010).

Furthermore, the Court takes judicial notice of the fact that according to New York Penal Law, (Section 220.00 subdivision 9), a "Hallucinogen" means any controlled substance listed in schedule I (d) of the Public Health Law. Schedule I (d) (25) of the Public Health Law lists as a

hallucinogenic substance, 3, 4-methylenedioxymethamphetamine or MDMA, the substance noted in this matter. The American Heritage Dictionary defines a hallucinogen as a substance that induces hallucination or a distortion of objects and events. The Department has an interest in ensuring that its uniformed members of the service who carry firearms are not under the influence of hallucinogens.

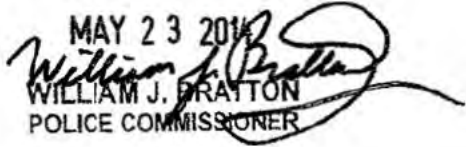
Since Respondent has violated the Department's rule against using illegal drugs, I am left with no alternative but to recommend that he be DISMISSED from the New York City Police Department.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner-Trials

APPROVED

MAY 23 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

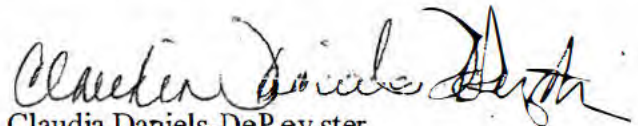
From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JOSEPH MARTINS
TAX REGISTRY NO. 932972
DISCIPLINARY CASE NO. 2013-9677

In 2010, 2011 and 2012, Respondent received an overall rating of 4.5 “Highly Competent/ Extremely Competent” on his annual performance evaluations. Respondent has received two Excellent Police Duty medals and two Meritorious Police Duty medals in his career to date.

[REDACTED]

Respondent has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyer
Assistant Deputy Commissioner Trials